SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 194

LOCAL UNION NO. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT CHARGING PARTIES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The decision below that a breach of the duty of fair representation constitutes an unfair labor practice under 8(b)(1)(A) of the National Labor Relations Act is eminently correct. The concept that the collective bargaining agent is charged with the obligation to represent fairly all members of the bargaining unit, under federal acts which give to the collective bargaining process the support and sanction of the federal authority, was first announced by this Court in *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192. With that decision the doctrine became settled federal law and soon thereafter was held to be an obligation under the National Labor Relations Act. *Ford Motor Company* v. *Huffman*, 345 U.S. 330. It was not until recently, however, that the National Labor Relations

Board held that racial discrimination in respect to the terms and conditions of employment violated the duty of fair representation owed to members of the bargaining unit, and as such constituted an unfair labor practice. See *Hughes Tool Company*, 147 NLRB 1573 (1964); *Local 1367, International Longshoremen's Association*, 148 NLRB 897 (1964).

Prior to these racial discrimination cases, the Board had held that "invidious discrimination" in a non-racial category was a breach of the duty of fair representation and an unfair labor practice. *Miranda Fuel Company*, 140 NLRB 181 (1962). That decision was denied enforcement by the Court of Appeals for the Second Circuit. *National Labor Relations Board* v. *Miranda Fuel Company*, 326 F. 2d 172 (2nd Cir. 1963). Petitioner argues that the decision below is in conflict with the decision of the Second Circuit.

As Mr. Justice Fortas pointed out in his concurring opinion in *Vaca* v. *Sipes*, 386 U.S. 171, 17 L. Ed. 842, 862, however, the only majority holding in *Miranda* was to deny enforcement of the Board's order. Judge Medina held that the Board was in error in holding that a breach of the duty of fair representation outside the context of activity to encourage or discourage membership in the union was properly an unfair labor practice. Judge Friendly took the position that the Board was correct and that a breach of duty of fair representation was an unfair labor practice. Chief Judge Lumbard found it unnecessary to decide the question. Therefore, it cannot be said that the decision of the Court of Appeals for the Second Circuit in *Miranda* conflicts with the decision below. On the other hand, the decision of the Court of Appeals for the District of Columbia Circuit in *Truck Driver's, Local 568* v. *National Labor Relations Board* (*Red Ball Motor Freight, Inc.*), 65 LRRM 2309, decided May 18, 1967, is in accord with the decision below.

The basic issue in this cause does not raise a substantial federal question. There can be little doubt at this late date that the collective bargaining agent must act for all employees without differentiation based on color. Where it discriminates against Negro members of the bargaining unit because of their race, it has violated the duty of fair representation. Nor, despite the recent entrance of the Board into this area, is there any substantiality to a claim that hostile racial discrimination by the collective bargaining agent against Negro members of the bargaining unit is outside the unfair labor practices provisions of the National Labor Relations Act. Indeed, this Court in ruling in *Vaca* v. *Sipes, supra,* that the pre-emption doctrine was not applicable to this category of cases, assumed the correctness of the holding below. The important federal question implicit in this line of cases is whether by construing a breach of the duty of fair representation as an unfair labor practice, fair representation cases now come within the broad pre-emption doctrine established by *San Diego Buildings Trade Council* v. *Garmon,* 359 U.S. 236. But this Court in *Vaca* v. *Sipes, supra,* has made clear that the *Garmon* case does not apply to fair representation suits which mark another exception to the *Garmon* rule. See *Humphrey* v. *Moore,* 375 U.S. 335. Therefore, here both the courts and the Board have concurrent jurisdiction.

In this respect the decision below is at variance with the decision of this Court in *Vaca* v. *Sipes.* The Fifth Circuit assumed that since racial discrimination constitutes an unfair labor practice, *Garmon* would apply and that the Board would have exclusive jurisdiction, except in respect to specific concurrent jurisdiction which Congress had accorded under Title VII of the Civil Rights Act of 1964. However, that question is only of peripheral concern here. The charging parties invoked the jurisdiction of the Board and the fact that they might properly

have raised their contentions in a judicial proceeding in the first instance is immaterial.

For these reasons, it is respectfully submitted, the petition for writ of certiorari should be denied.

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